BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DOAN VAN LE Claimant VS. **EXACTA AEROSPACE, INC.** Respondent AND **ACCIDENT FUND NATIONAL INS. CO. OF AMERICA** Insurance Carrier	)	Docket No. 1,060,178

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 20, 2012, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Kenton D. Wirth, of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's actions of March 14, 2012, were not a reckless violation of respondent's rules and that respondent failed to show claimant acted with willful behavior or obstinate intent. Accordingly, the ALJ ordered respondent to pay the medical expenses claimant incurred as a result of his injury and further ordered respondent to pay any additional medical expenses incurred by claimant related to his injuries. Dr. Thomas Tran was appointed as claimant's authorized treating physician. The ALJ also found that claimant was entitled to receive temporary total disability benefits from March 14, 2012, to May 17, 2012, less one week that claimant returned to work for respondent, and then from May 17, 2012, and ongoing until claimant is either released to return to work or his medical condition changes from temporary to permanent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 17, 2012, Preliminary Hearing and the exhibits and the evidentiary

deposition of Michael Dickens taken May 23, 2012, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant recklessly disregarded respondent's safety regulations when he sustained his injury and is therefore not eligible for workers compensation benefits.

Claimant asserts he did not knowingly violate a safety rule and that his conduct was not reckless. Claimant argues he is entitled to the preliminary benefits ordered by the ALJ.

The issue for the Board's review is: At the time claimant sustained his injury, was claimant's conduct reckless so as to deny eligibility for workers compensation benefits?

FINDINGS OF FACT

Claimant began working for respondent on August 21, 2011, as a machine operator. He was injured on March 14, 2012. That morning, claimant was setting up a part for a machine and the materials he needed were on the top shelf of a shelving unit. Claimant climbed on the shelves to get the part down. He had previously climbed the shelves on a weekly basis to clean or retrieve materials. On this day, however, the shelf broke and claimant fell. Materials from the shelving unit fell on his leg. Claimant injured his left hand and left leg.

Everyone who testified in this case described the shelving unit as being about five feet tall with a metal frame. The shelves were wooden. Claimant testified he believed the shelves could hold over 2,000 pounds. Two of respondent's witnesses said the shelves could hold several hundred pounds. Claimant's supervisor testified that the heaviest pallet of material would weigh 100 to 150 pounds. Claimant is 5'4" tall and weighs 140 pounds.

After claimant was hired by respondent, he was trained by Michael Dickens. Claimant testified that Mr. Dickens told him that if he needed to, he could climb on the shelves to get the materials he needed. Claimant said Mr. Dickens climbed up on the shelves when he was training claimant. Claimant did not see any other employees climbing up on the shelving other than himself and Mr. Dickens. No one ever told claimant not to climb up on the shelves. Before his accident, claimant had not known of any rule that said he was not supposed to climb up on the shelves. After his accident, claimant was reprimanded for violation of company policy for climbing on the shelves.

Claimant acknowledged that he underwent an orientation process when he was first hired. He was provided with an employee handbook and signed an acknowledgment that he had received it. When asked about respondent's policies, claimant said: "Whatever my

trainer say then I would follow that instruction."[1] Claimant testified that Mr. Dickens said claimant could not ride a forklift because he did not have a forklift license, "so I can climb to the shelf and bring that part down."[2] Claimant testified no one in his area was forklift certified, but that his supervisor was certified. Claimant had previously asked his supervisor to retrieve materials from the top shelf with a forklift if the items he needed were very heavy. But he did not ask him to use a forklift to retrieve the materials he needed on the date of his accident because the materials he needed were not heavy.

Shawna Biggars is the director of human resources for respondent. She confirmed that respondent has a company policy manual. Ms. Biggars said as part of claimant's hiring, he was provided with a copy of the company employment manual and signed the Policy Manual Acknowledgment.

Ms. Biggars said the Policy Manual Acknowledgment signed by claimant indicates he read and understood the contents of the personnel manual. If an employee had indicated he or she had a problem reading the manual because it is in English, respondent would have provided translation services. Claimant did not convey to Ms. Biggars that he needed assistance reading the document. Ms. Biggars said she was always able to converse with claimant in English.

The personnel manual has a section covering employee conduct for the purpose of providing a safe work environment. The employee conduct section states in part: "Set forth below is a partial listing of Exacta Aerospace's policies on employee conduct that is intended to be illustrative and not exclusive."[3] Ms. Biggars said that statement is included in the employee conduct section because it would be impossible to provide a written policy against every possibility.

Ms. Biggars said respondent has an unwritten policy regarding retrieving materials from the top shelf of the shelves in the factory wherein employees are to use a certified licensed forklift driver. Ms. Biggars said employees are not supposed to climb up on the shelves as that is a violation of company policy. She admitted that respondent has no written company policy about climbing on the shelves other than the unwritten policy that requires materials on the top shelf to be retrieved by a forklift. Ms. Biggars was not involved in claimant's training, but it is her belief that claimant would have been told during his training that a forklift should be used to retrieve materials from the top shelf.

Ms. Biggars said she had been in the shop on occasion and had never witnessed claimant climbing the shelving unit. Respondent interviewed employees and only one had

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[1] P.H. Trans. at 20.

[2] *Id*. at 20-21.

[3] *Id.*, Resp. Ex. 3.

seen claimant climb on the shelving unit. Claimant's immediate supervisor told Ms. Biggars he had never seen claimant climbing on the shelving. Ms. Biggars admitted there were no signs posted on the premises to tell claimant not to climb on the shelving.

Claimant was disciplined after his accident. Ms. Biggars said she read the memorandum concerning his discipline to him, after which he apologized for his actions in climbing the shelves. Ms. Biggars said claimant admitted he knew he should not have been on top of the shelves.

Kelly Eilerts was claimant's supervisor. He is a working supervisor and is forklift certified. He said respondent's policy regarding retrieving materials is that if it is too heavy or too high (out of reach), an employee is to get a forklift. If the employee is not forklift certified, he or she gets someone who is forklift certified. Mr. Eilerts said every day he is asked to retrieve materials for employees. Further, claimant has asked Mr. Eilerts to retrieve materials on a weekly basis. Mr. Eilerts never saw claimant climbing the shelves. If he had seen claimant climb a shelf, he would have told him to get down and would have warned him not to climb the shelf again. No one ever told Mr. Eilerts that claimant climbed up on the shelving unit. Mr. Eilerts never witnessed any other employee climb up on the shelving unit to obtain material or clean off the top. He never saw Mr. Dickens, who trained claimant, climb up on the shelving unit. Mr. Eilerts said claimant had been verbally told that he was to get help from a forklift operator to retrieve material from the top shelves. Mr. Eilerts supervises 19 people, at least 5 of whom are forklift certified, not including himself. These forklift certified individuals work in the same general area as claimant.

Mr. Eilerts was at work on the day claimant fell. He went over to claimant and helped stopped the bleeding while someone called the paramedics. While Mr. Eilerts was with claimant, claimant apologized for not getting Mr. Eilerts to help him. Claimant told Mr. Eilerts he did not want to bother him.

Michael Dickens previously worked for respondent. He was terminated by respondent in September 2011. Mr. Dickens was involved in training claimant, and they also worked together. Mr. Dickens testified he told claimant he could stand on a pallet that was on the floor in front of the shelf in order to reach items on the top shelf. If claimant was needing a large or heavy piece, he should get a forklift. Mr. Dickens denied training claimant to climb up the shelves to retrieve material. He denied ever seeing claimant climb up the shelves. He denied telling claimant it would be permissible to climb on the shelves. Mr. Dickens did not recall a time when he climbed up on a shelving unit to obtain parts. Mr. Dickens said the pieces of wood used in the shelves were not stable, and he knew better than to get up onto those wood pieces.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-501(a)(1) states in part:

> (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> . . . .
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> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
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> (D) the employee's reckless violation of their employer's workplace safety rules or regulations, ...

The Kansas Court of Appeals, in *Carter*,[4] stated that violation of instructions alone is not enough to render an employee's actions as "willful" as a matter of law. The court held:

> For a violation of instructions to be "willful" under K.S.A. 44-501(d), it must include "the element of intractableness, the headstrong disposition to act by the rule of contradiction." *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 Pac. 934 (1920).[5]

In *Wiehe*,[6] the Kansas Supreme Court quoted Restatement (Second) of Torts § 500(a) (1965), pp. 587-588:

> **Types of reckless conduct**. Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of

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[4] *Carter v. Koch Engineering*, 74 Kan. App. 2d 74, Syl. ¶ 5, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[5] *Id.*, Syl. ¶ 6.

[6] *Wiehe v. Kukal*, 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

> facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
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> For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .
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> For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

The ALJ, who witnessed claimant's in person testimony, found claimant's testimony to be credible and persuasive. She determined that:

> . . . as a short person, he [claimant] regularly climbed on top of the shelf to obtain materials needed to operate his machine. The shelf unit is approximately five feet tall and is designed to hold several hundreds of pounds of material. Claimant further testified that prior to his accident, he was not aware of any rule or company policy prohibiting him from climbing onto the shelf to obtain materials.
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> . . . During the hearing, Claimant asserted that he had been trained to perform his job and that it was acceptable to climb on top of the shelves to get the necessary materials. The person who trained Claimant indicated that he did not train Claimant to climb on the shelving units. However, it is an undisputed fact that the employer has no written company policy that addresses climbing on the shelving unit.

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[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2011 Supp. 44-555c(k).

> . . . During his tenure with Respondent as a machine operator, Claimant was required to set up his machine using materials from the shelving unit. Claimant, on a regular basis, climbed on the unit to retrieve materials. Claimant never received any oral or written reprimands for his activities until he fell.[9]

The Board generally gives some deference to an ALJ's determination regarding the credibility of witnesses, particularly when the ALJ witnessed the testimony in person.[10] Having reviewed the testimony herein, this Board Member finds it is appropriate to give deference to the ALJ's credibility findings in this case.

K.S.A. 2011 Supp. 44-501(a)(1)(D) is intended to apply to conduct that is willful and reckless, not conduct that is mere negligence, poor judgment or ill advised. Claimant said he did not get Mr. Eilerts to help him because he thought Mr. Eilerts was busy and claimant did not want to bother him. It was not because claimant did not want to follow a safety rule. To the contrary, claimant was not aware that he was violating a rule by climbing on the shelf to get materials he needed. Claimant did not recklessly violate a company safety rule. Claimant believed the shelf would support his weight. He was wrong. Nevertheless, his conduct did not rise to the level of being reckless.

CONCLUSION

Claimant's injury neither resulted from his willful failure to use a reasonable and proper guard, nor did it result from a reckless violation of a workplace safety rule.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated August 20, 2012, is affirmed.

IT IS SO ORDERED.

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[9] ALJ Order (Aug. 20, 2012) at 2.

[10] See, *e.g.*, *Wood v. Medicalodges, Inc.*, Docket No. 1,051,863, 2011 WL 1747859 (Kan. WCAB Apr. 7, 2011); *Holman v. Epixtar Corp/Nol Group, Inc.*, Docket No. 1,039,925, 2008 WL 4763721 (Kan. WCAB Sept. 30, 2008).

Dated this _____ day of November, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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Nelsonna Potts Barnes, Administrative Law Judge